

VOLUME NO. 44

OPINION NO. 21

CITIES AND TOWNS - Authority of city judge to hold office as trustee of community college district;
COMMUNITY COLLEGES - Authority of city judge to hold office as trustee of community college district;
COURTS, CITY - Authority of city judge to hold office as trustee of community college district;
JUDGES - Authority of city judge to hold office as trustee of community college district;
PUBLIC OFFICERS - Authority of city judge to hold office as trustee of community college district;
MONTANA CODE ANNOTATED - Title 20, chapter 15; sections 1-1-202(2), 3-1-101(6), 3-1-607, 3-1-608;
MONTANA CONSTITUTION - Article VII, section 10.

HELD: A city judge is prohibited by Article VII, section 10, of the Montana Constitution from holding office as an elected trustee of a community college district.

October 22, 1991

Charles W. Jardine
Miles City Attorney
P.O. Box 532
Miles City MT 59301

Dear Mr. Jardine:

You have requested my opinion on the following question:

Must a person appointed city judge resign his position as trustee on the board of trustees for a community college?

The answer to your inquiry turns on the meaning of Article VII, section 10, of the Montana Constitution, which provides:

Forfeiture of judicial position. Any holder of a judicial position forfeits that position by either filing for an elective public office other than a judicial position or absenting himself from the state for more than 60 consecutive days.

When construing a provision of the constitution, the same rules used in statutory construction are applied. Keller v. Smith, 170 Mont. 399, 553 P.2d 1002, 1006 (1976). In either case, the intent of the framers is controlling. *Id.* at 405. The rules of statutory construction require that the language of the constitution be given its plain and ordinary meaning. Rierson v. State, 188 Mont. 522, 614 P.2d 1020, 1023, on reh'g, 622 P.2d 195 (1980). The function of statutory construction is "simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted." § 1-2-101, MCA.

Section 10 of Article VII was "designed to prevent judgeships being used as stepping stones for the fulfillment of political ambition." I Mont. Const. Conv. 522 (1971); IV Mont. Const. Conv. 1120 (1971). As originally drafted in the majority report of the Judiciary Committee, the provision stated: "No justice of the supreme court or district judge shall hold any other public office, except that he may be a member of the Judicial Standards Commission, while he remains in the office to which he has been elected or appointed." I Mont. Const. Conv. 492 (1971). The minority proposal included a sentence in the section pertaining to qualifications and limitations of Supreme Court justices and district judges which stated: "Filing for another elective public office results in forfeiture of judicial position." I Mont. Const. Conv. at 512 (1971).

The provision later was amended to allow judges to seek other judicial positions without forfeiting their offices, and there is some indication that the delegates intended the forfeiture provision to apply to judges of limited jurisdiction courts. When the amendment was added allowing judges to hold other judicial office, discussion among the delegates included mention of justices of the peace not having to forfeit their offices if they chose to run for another judicial position. IV Mont. Const. Conv. 1149 (1971).

The result of the debate was section 10 of Article VII, which refers to "[a]ny holder of a judicial position." [Emphasis added.] The Montana Supreme Court has stated that this provision "applies to *all* judges in this state." Committee for an Effective Judiciary v. State, 209 Mont. 105, 679 P.2d 1223, 1227 (1984) (emphasis in original).

State law defines "judicial officers" as "justices of the supreme court, judges of the district courts, justices of the peace, municipal judges, and city judges." § 1-1-202(2), MCA. "Courts of justice" also include the city courts. § 3-1-101(6), MCA. However, the statutory provisions implementing Article VII, section 10, are limited to the forfeiture of office by supreme court justices and district judges; there is no mention of justices of the peace, municipal judges, or city judges. §§ 3-1-607, 3-1-608, MCA.

Given the broad language of Article VII, section 10, and in view of the Supreme Court's holding that it applies to *all* judges, I conclude that the constitutional provision must be construed to include city judges, notwithstanding the lack of parallel statutory language.

Having so concluded, I next turn to the issue whether the position of trustee of a community college is an "elective public office" within the meaning of Article VII, section 10, of the Montana Constitution. "A public office has been defined as 'a public trust or agency created for the benefit of the people.'" State ex rel. Hollibaugh v. State Fish and Game Commission, 139 Mont. 384, 365 P.2d 942, 948 (1961). Public office involves "a delegation ... of some of the sovereign functions of government, to be exercised ... for the benefit of the public." State ex rel. Barney v. Hawkins, 79 Mont. 506, 257 P. 411, 413 (1927). Characteristics of public office may include, among others, the taking of an official oath, a definite term of service, and prescription of duties by law. *Id.*, 257 P. at 414.

It is my understanding that, prior to becoming city judge, the city judge was elected to the position of trustee in accordance with the provisions of Title 20, chapter 15, MCA, which govern community college districts. Under section 20-15-204, MCA, trustees are ordinarily elected at large and serve terms of three years. Once elected, the trustees are qualified by taking the oath of office prescribed by the Montana Constitution. §§ 20-15-210, 20-15-222(2)(a), MCA.

Trustees of a community college district, subject to supervision by the board of regents, have general control and supervision of the community college and its property, have general control of all receipts and disbursements of the community college, have the authority to call and conduct elections of the district and to establish employee benefits, and have other powers and duties prescribed by law. § 20-15-225(1), MCA. In addition, the trustees hold in trust all real and personal property of the district for the benefit of the college and its students. § 20-15-225(2), MCA.

Based upon the construction of the term "public office" by the Montana Supreme Court, I conclude that a member of a community college district board of trustees holds an "elective public office" as that term is used in Article VII, section 10, of the Montana Constitution. A trustee is elected by the people of the district, serves a fixed term, and is required to take an oath to be qualified to hold office. The position is one of trust, to be exercised for the

benefit of the people and, although the trustees are under the direction of the board of regents, involves the exercise of independent discretion and judgment.

Finally, you suggest that Article VII, section 10, would prohibit a city judge from filing for future election to the board of trustees but does not prohibit him from continuing in that office by virtue of his position as city judge. The effect of Article VII, section 10, however, is to prohibit a judicial officer from holding any other public office, and the order in which the offices were obtained cannot be considered distinctive. "Statutory or constitutional construction should not lead to absurd results if a reasonable construction will avoid it." State ex rel. Ronish v. School District No. 1, 136 Mont. 453, 348 P.2d 797, 801 (1960); Gaub v. Milbank Ins. Co., 220 Mont. 424, 715 P.2d 443, 445 (1986). See also 48A C.J.S. Judges § 31 at 584 (1981) (judicial office may become vacant if judge accepts or continues to hold another office of profit or trust).

Accordingly, since a city judge constitutes the "holder of a judicial position" and a member of a community college board of trustees holds an "elective public office," section 10 of Article VII of the Montana Constitution prohibits the city judge from holding that office.

Although you suggest that the two offices are not incompatible, I find it unnecessary to consider this issue because compatibility is not a factor under the language of the constitution.

THEREFORE, IT IS MY OPINION:

A city judge is prohibited by Article VII, section 10, of the Montana Constitution from holding office as an elected trustee of a community college district.

Sincerely,

MARC RACICOT
Attorney General